The Legal Intelligencer

The Last Words?

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In the previous column I reviewed two recent e-discovery decisions, the Jan. 15 decision by U.S. District Judge for the Southern District of New York Shira A. Scheindlin in Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities and the Feb. 19 decision by U.S. District Judge for the Southern District of Texas Lee H. Rosenthal Rimkus Consulting Group Inc. v. Cammarata. Both focused on the issue of how to gauge the relevance of e-discovery lost by the producing party at the prejudice of that loss to the requesting party when the e-discovery is, by definition, lost and so unknown.

We reviewed the facts in both matters and Pension Committee's approach of creating presumptions of relevance and prejudice when the data is lost due to the gross negligence or willfulness of the producing party. This week, we will analyze Rimkus' approach, discuss the strengths and weaknesses of both and place them in the context of unfolding e-discovery jurisprudence.

Strengths And Weaknesses

In contrast with Pension Committee, Rimkus takes a more conservative approach both in analyzing degrees of culpability and valuing the loss of data a party has failed to preserve. In issuing the opinion in Rimkus, Rosenthal looked at Pension Committee carefully and noted two differences between her matter and Scheindlin's matter.

First, while the "focus of Pension Committee was on when negligent failures to preserve, collect, and produce documents — including electronically stored information — in discovery may justify the severe sanction of a form of adverse inference instruction," Rimkus did not "involve allegations of negligence in electronic discovery" but, instead, involved "allegations of intentional destruction of electronically stored evidence." The second was that, unlike in the First, Second, Fourth and Ninth Circuits, but like in the Seventh, Eighth, Tenth, Eleventh and D.C. Circuits, "mere negligence" leading to the destruction of discovery would be insufficient in the Fifth Circuit to warrant "severe sanctions," such as "granting default judgment, striking pleadings, or giving adverse inference instructions;" instead, the party seeking such sanctions would have to present "evidence of 'bad faith.'"

"The court in Pension Committee," Rosenthal carefully explained, "applied case law in the Second Circuit" which has been construed "to allow severe sanctions for negligent destruction of evidence." However, in the "Fifth Circuit and others, negligent as opposed to intentional, 'bad faith' destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve the party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial." Thus, the court reasoned, the "circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the Pension Committee approach."

Rosenthal next turned to Pension Committee's rule that gross negligence or willfulness by the producing party can create a presumption that the lost data was relevant and its loss was prejudicial to the requesting party. While she "recognized the difficulty and potential for unfairness in requiring an innocent party seeking discovery to show that information lost through spoliation is relevant and prejudicial," there are, "in many cases" — the instant matter included — "sources from which at least some of the allegedly spoliated evidence can be obtained."

Moreover, "in many cases," including the instant matter, "the party seeking discovery can also obtain extrinsic evidence of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence."

Rosenthal noted the concern that Scheindlin had noted in Pension Committee, i.e. the producing parties' concern that "a

showing that the lost information is relevant and prejudicial is an important check on ... speculative or generalized" spoliation allegations and sanctions motions. For the court in Rimkus, the requesting party satisfies its burden of proving relevance and prejudice, warranting the strong sanction of an adverse inference instruction, "when the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support its claims or defenses."

Rosenthal noted that Pension Committee's rule of presumption of relevance and prejudice, while not having been explicitly addressed by the Fifth Circuit, runs counter to case law on the subject. Moreover, in the matter before Rosenthal, "the party seeking sanctions for deleting emails after a duty to preserve had arisen presented evidence of their contents." Thus, there was "neither a factual nor legal basis, nor need, to rely on a presumption of relevance or prejudice."

Jurisprudence of E-Discovery

There are strengths and weaknesses with the approaches taken in both Pension Committee and Rimkus on the issue of how to value the unknown.

The strength of the Pension Committee case is that it sets forth clear rules of conduct. Practitioners advising clients to take expensive preservation, collection and search steps regarding e-discovery are regularly asked by their clients to show them the law demanding that such steps must be done and what will happen to them if they do not take those steps. Those practitioners must point to cases that can be confined to their facts and best practices and then ask their clients whether they want to risk severe sanctions — the answer to which is often "yes."

Pension Committee gives practitioners a better answer to their clients' demand for the case that says they must do what counsel advises.

More than providing clear guidance, by focusing upon the conduct of the producing party and not the contents of the lost data, Pension Committee allows the court to assess the issue of spoliation on the basis of what it can know, i.e., what the producing party did or failed to do, rather than on the basis of what it usually cannot know, i.e., what the contents of the lost data were. In short, Pension Committee creates a workable rule.

Finally, the Pension Committee's rule prohibits the galling misconduct in discovery production of a party who destroys data or allows it to be destroyed and then claims that it cannot be faulted because the opposing party cannot prove that the data was relevant and its loss prejudicial. Just as the murderer who has killed his parents cannot ask for mercy because he is an orphan, the custodian of destroyed records should not be allowed to claim that a requesting party could not meet its burden of proving records relevant because the custodian was delinquent in its duty to preserve and produce those records.

The strength of Pension Committee, however, is also its weakness: its inflexibility.

The rule that a failure to issue a written preservation hold memo is per se gross negligence provides a perfect example of the problem of inflexibility. It is very easy for practitioners to call to mind numerous instances where they scrupulously oversaw the preservation, collection and production of e-discovery when no litigation hold memo was issued. Under Pension Committee, their clients were grossly negligent, even though the actual discovery productions were models of efficiency and candor. I recently attended a Sedona Conference event at which numerous attendees and panelists voiced this objection to Pension Committee.

A related objection is that, while e-discovery aficionados will recognize that the schema set forth in Pension Committee has to be understood in the context of the facts that underlay the dispute, i.e., where numerous parties simply failed to preserve data for years, when Pension Committee is applied, busy courts will simply grab the "teaching portion" of the opinion where the bright line rules are announced and not try to contour those rules to the case before that busy court, as Scheindlin herself would certainly do.

Courts with absurdly overcrowded dockets and no special expertise in e-discovery will simply read the bright line rules and apply them mechanically, to the detriment of the party that may have failed to have a litigation hold memo issued but still preserved and produced discovery properly, or who failed to collect the files of key players after the duty to preserve arose but nevertheless did not lose any of them, or whose failure to preserve data plainly did not prejudice the requesting party because it received that same data from another source.

The strengths and weaknesses of Rimkus are the inverse of those of Pension Committee.

Rimkus' strength, for one, is its flexibility.

Since evidence of willful destruction of relevant data resulting in prejudice to the requesting party was present in Rimkus, the court did not have to create or rely upon inflexible rules or evidentiary presumptions; the sole reason for Rimkus' discussion as to whether negligence of any degree could lead to spoliation sanctions and trigger presumptions was to respond to Pension Committee. Under Rimkus, producing parties have the same duty to preserve and produce data as do parties under Pension Committee. But counsel to those parties do not, under Rimkus, have to be concerned that they may be subject to serious sanctions for failure to promulgate a written litigation hold memo notwithstanding an otherwise proper production of discovery or for failure to preserve data notwithstanding uncontroverted proof that the requesting party suffered no prejudice. Such an example is extrinsic evidence that showed data was irrelevant or was produced from another source.

Rimkus' flexibility is, of course, also its weakness. It does not give practitioners the clear guidelines that Pension Committee provides.

Furthermore, it does not tackle the Maltese Falcon problem of valuing the unknowable, a problem compounded by the inequity of placing the burden of proving that value — that the lost data was relevant and its loss was prejudicial — on the requesting party, as is typically the case, when the requesting party is both wholly innocent regarding the loss of the requested data and when the party responsible for the loss, the producing party, was in the best position to know the data's relevance as well as the prejudice to the requesting party caused by the loss.

Overall, however, the "problems" with Pension Committee and Rimkus are not in the opinions themselves but in the jurisprudence of e-discovery case law: the nature of e-discovery disputes and how they arise guarantees that appellate case law sufficient to guide practitioners will never be generated.

Consider the "war on drugs," starting in the mid 1980s with the rise in use of crack cocaine and abating somewhat after September 11 when law enforcement priorities changed.

Since virtually every drug arrest involved a search and seizure and those convicted had a right to appeal and appointed counsel, thousands of Fourth Amendment cases were decided by the federal and state appellate courts, creating a healthy jurisprudence of search and seizure law. By contrast, almost all e-discovery matters settle and those that go to court are rarely reported and more rarely appealed, meaning few e-discovery opinions and even fewer appellate ones.

If Pension Committee's bright line rules were in the context of criminal discovery, hundreds or thousands of cases would follow to hammer out the contours of the bright line rules — much like what happened after the U.S. Supreme Court's seminal criminal discovery opinion in Brady v. Maryland.

Scheindlin's solution to the "Maltese Falcon" problem would be challenged, clarified, narrowed, excepted and accepted. Because of the dearth of e-discovery opinions, however, the concern of practitioners that Pension Committee's rules will be wrongly applied is a realistic one.

The way to address that concern, however, is not to criticize the thoughtful voices of Scheindlin and Rosenthal, but for other thoughtful jurists to join the debate.

Let us hope that a more robust jurisprudence of e-discovery will be a reality and not, as Spade describes the Falcon at the end of the narrative (quoting Prospero's, and Shakespeare's, farewell at the end of The Tempest), "The stuff that dreams are made of."

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